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In The

Supreme Court of the United States

October Term, 1987

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

WILLIAM A. KILPATRICK, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District Of Columbia non-profit corporation with a membership of more than five thousand lawyers from every state of the nation. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of the defense lawyer in criminal cases.

The NACDL also concerns itself with the promotion of the proper administration of criminal justice. Consequently, Amicus Curiae NACDL

submits this brief because this case presents important issues concerning the federal judiciary's ability to prevent and sanction serious prosecutorial misconduct in the grand jury system. The Amicus Curiae Committee of the NACDL has discussed this case and resolved that the issues in this case are of such importance to the criminal justice system that the NACDL should offer its assistance to the Court. The Petitioners, The Bank of Nova Scotia and William A. Kilpatrick, et al., and the Respondent, the United States of America, have consented to the NACDL's participation as amicus curiae, as evidenced by letters of consent that have been filed with this Court.

STATEMENT OF THE CASE

Recitations of the pertinent facts have been adequately set forth by the Petitioners in their respective briefs and are here adopted.

SUMMARY OF THE ARGUMENT

Over the past forty-five years, this Court has, in the exercise of its supervisory authority over the administration of criminal justice in the federal courts, "establish[ed] and maintain[ed] civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340 (1943). The Court's supervisory authority serves a twofold institutional purpose of preserving the integrity of the judicial process and deterring prosecutorial misconduct. A third purpose, the implementation of a remedy for a

violation of recognized rights, provides a means to vindicate the interests of the public by protecting it from lawless behavior or misconduct by the Government and maintaining the integrity of the criminal justice system.

When the Government engages in serious misconduct in a grand jury proceeding, or when such conduct has become pervasive and flagrant in a particular circuit, a federal court must be authorized to exercise its supervisory power and dismiss an indictment, despite the absence of demonstrable prejudice to the defendant. This exercise of supervisory power will preserve the public's confidence in the integrity of the grand jury process and will deter future prosecutorial misconduct.

The federal court's authority to

dismiss an indictment under its supervisory authority exists independent of its authority to dismiss an indictment under the Fifth Amendment to the Federal Constitution. If misconduct by the Government undermines a grand jury's ability to perform in an informed and unbiased manner and thereby results in actual prejudice to the defendant, the misconduct is remediable under the Fifth Amendment's grand jury and due process clauses. A remedy must also be available, however, where the Governmental misconduct is serious and pervasive but the defendant, in a pre-trial setting, is unable to demonstrate actual prejudice. What is at stake in that situation is the integrity of the judicial system. The Court's supervisory power is the only available protection for that integrity.

ARGUMENT

WHEN THE GOVERNMENT ENGAGES IN SERIOUS MISCONDUCT IN A GRAND JURY PROCEEDING, A FEDERAL COURT MAY, IN THE EXERCISE OF ITS SUPERVISORY POWER, DISMISS THE INDICTMENT IN ORDER TO PRESERVE THE INTEGRITY OF THE GRAND JURY PROCESS AND DETER FUTURE PROSECUTORIAL MISCONDUCT.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Implicit in that language is the guarantee of an informed and independent investigative body whose mission is to stand between the accuser and the accused to determine whether a charge is founded upon probable cause. United States v. Dionisio, 410 U.S. 1, 16-18 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962). This guarantee presupposes a grand jury that will "provide a fair method for instituting

criminal proceedings", Costello v. United States, 350 U.S. 359, 362 (1956), serve as a "protector of citizens against arbitrary and oppressive governmental action", United States v. Calandra, 414 U.S. 338, 343 (1974), and insulate citizens from unfounded prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686 (1972).

If abuse or misconduct by a prosecutor undermines a grand jury's ability to perform its role in an informed and independent manner or to exercise its independent judgment in the charging decision, the dismissal of an indictment will be warranted in order to protect an individual defendant's constitutional rights. United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983). In such cases, the focus will "not [be] on the degree of

culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality". Id. at 1392. In order to invoke the Court's authority to dismiss an indictment based on a violation of his own individual constitutional rights, a defendant must demonstrate that the prosecutor's conduct resulted in actual prejudice; i.e., that the grand jury's independence was so undermined that it could not make an informed and unbiased determination of probable cause. Id. at 1392.

The federal court possesses, independent of the authority to dismiss an indictment based on a violation of an individual defendant's constitutional rights, the authority to dismiss an indictment based on its supervisory power. The use of supervisory power promotes two institutional goals:

deterring prosecutorial misconduct and preserving the integrity of the judicial process. United States v. Payner, 447 U.S. 727, 736 n.8 (1980) A third goal, the implementation of a remedy for a violation of recognized rights, United States v. Hasting, 461 U.S. 499, 505 (1983), benefits the individual defendant. However, in this sense, "the individual defendant . . . serves only as a conduit for vindication of the public interest" and the dismissal of the indictment is only incidental to the public's primary interest in the deterrence of prosecutorial misconduct and the integrity of the criminal justice system. Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct, 45 Ohio St. L.J. 1077, 1098 (1984)(quoting United

States v. Sears, Roebuck & Co., 719 F.2d at 1395 (Norris, J., dissenting in part)). Clearly, the goals underlying the court's supervisory power are separate and distinct from the goal of protecting a defendant's constitutional rights.

This Court has relied on its inherent supervisory power over the administration of justice in the federal courts as an independent basis for decision for the past forty-five years. This Court's first supervisory power decision, McNabb v. United States, 318 U.S. 332, 340 (1943), recognized the Court's duty to promulgate and maintain "civilized standards of procedure and evidence". These developing standards aimed to guard against "the misuse of the law enforcement process" and "the dangers of the overzealous as well as the

despotic". Id. at 343. They were designed as "an important safeguard--not only in assuring the protection of the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society." Id. at 344.[1] Significantly, in McNabb, the Court emphasized its primary concern for the

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[1]The opinion in McNabb reflects the Court's decision to dissociate itself from the unlawful investigative practices that had earlier been approved by the Court. The opinion further reveals the influence of Justice Brandeis' dissenting opinions in Casey v. United States, 276 U.S. 413, 425 (1928)(Brandeis, J., dissenting), and Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting). In those dissenting opinions, Justice Brandeis cautioned that illegal government conduct "breeds contempt for law" and "invites every man to become a law unto himself". He further argued that the Court's ratification of illegal government conduct in order to secure the conviction of an accused "would bring terrible retribution". The common theme in Justice Brandeis' opinions was the protection of the criminal justice system "from the illegal conduct of its officers" and the preservation of "the purity of its courts".

purity of the criminal justice system and held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law." Id. at 345.

In the several decades since the McNabb decision, this Court has continued to exercise its supervisory authority in federal cases to insure the integrity and fairness of the criminal justice system. In the vast majority of these cases, the Court has endeavored to formulate general rules of evidence and procedure, rather than remedy individual injustices. In Ballard v. United States, 329 U.S. 187 (1946), for example, the Court employed its supervisory power and dismissed indictments, finding that the

systematic exclusion of women from grand and petit jury panels departed from the scheme of jury selection adopted by Congress. Similarly, in Marshall v. United States, 360 U.S. 310 (1959), the Court dismissed an indictment because several trial jurors had been exposed to prejudicial newspaper articles about the defendant. Although each juror maintained that he would not be influenced by the articles, the Court exercised its supervisory power, finding that proper enforcement of the criminal law in the federal courts required a new trial.[2] The Court's primary concern in

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[2]Other cases exemplifying the Court's exercise of its supervisory power in the formulation of general rules of procedure and evidence are McCarthy v. United States, 394 U.S. 459 (1969)(the exercise of supervisory power in allowing a defendant to plead anew when a district judge accepted a guilty plea without fully adhering to the procedure set forth in Rule 11 of the Federal Rules of Criminal

the exercise of its supervisory power has been the integrity of the criminal justice system. As the Court aptly noted in Ballard v. United States, 329 U.S. at 195,

> The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

The Court further commented in Mesarosh v. United States, 352 U.S. 1, 14 (1956), that the Court's duty in exercising supervisory jurisdiction over federal court proceedings was "to see that the waters of justice are not polluted."

Procedure); United States v. Nobles, 422 U.S. 225 (1975) and Jencks v. United States, 353 U.S. 657 (1957)(the exercise of supervisory power in the regulation of discovery and disclosure); Young v. U.S. ex rel. Vuitton et Fils S.A., ___ U.S. ___, 107 S.Ct. 2124 (1987)(the exercise of supervisory power in requiring a new trial when the prosecutor in a contempt proceeding was counsel for an interested party in the underlying civil litigation).

These cases clearly illustrate that "the courts have an interest in judicial integrity that is distinct from their duty to enforce the rights of the litigants." S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1453 (1984). See also Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1659 (1963)("the supervisory-power decisions reflect concern about the degree of fairness in the judicial process", allowing the court "the new-found freedom to ignore whether particular litigants were harmed by the asserted error").

In United States v. Hasting, 461 U.S. 499 (1983), this Court considered the invocation of its supervisory power

in cases where the claimed error was "harmless"[3] and the matter has proceeded through trial. The Court noted that the exercise of its supervisory power should be approached with some caution, after balancing the interests involved, including the interest in the prompt administration of justice and the interests of the victims. The Court held that when the error was harmless and minimal, the countervailing interest in the finality of the conviction outweighed

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[3]Under the "harmless-error doctrine", some constitutional errors in the context of a particular case are so "unimportant and insignificant" that they properly may be deemed harmless, not requiring the automatic reversal of a conviction. Chapman v. California, 386 U.S. 18, 22 (1967). However, the harmless-error doctrine can never be applied to errors that are "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case", Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), or that undermine "the structural integrity of the criminal tribunal itself." Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986).

the interests in preserving the integrity of the system and deterring future misconduct.[4] The Court further noted that, in such cases, the impact on the integrity of the system was negligible and other methods to deter the objectionable conduct existed.

Implicit in this Court's decision in Hasting is that the "harmlessness" of the alleged misconduct is an element to be considered. However, Hasting does not hold that the exercise of supervisory power is barred in cases involving a harmless error.[5] Note, The Exercise of

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[4]In Hasting, the claimed error involved a prosecutor's allusion to the defendants' failure to rebut the Government's evidence. The Court noted that the prosecutor's remark was "at most an attenuated violation" of a constitutional provision. Id. at 506.

[5]As Circuit Judge Seymour remarked in her dissenting opinion, "although harmlessness of the alleged misconduct is an element to be balanced against the desired result, it is not always

Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct, supra, at 1087. This Court's decision in Young v. United States ex rel. Vuitton Et Fils S.A., ___ U.S. ___, 107 S.Ct. 2124 (1987) is dispositive of this point. There, a district court appointed a private attorney to prosecute a contempt action against the petitioners. The private attorney was counsel for an interested party in the civil litigation underlying the contempt action. The Court reversed the petitioners' contempt convictions, holding that the exercise of its supervisory power was appropriate because of the potential for the

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dispositive. If the exercise of supervisory power were per se precluded by a finding of lack of prejudice, a balancing process would never be necessary." United States v. Kilpatrick, 821 F.2d 1456, 1478 (10th Cir. 1987)(Seymour, J., dissenting).

attorney's private interest to influence the discharge of his public duty:

> [T]he appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety. (emphasis in original)

Id. at ___, 107 S.Ct. at 2137. In so ruling, the Court emphasized its preeminent concern "in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness" and in prohibiting even the appearance of impropriety in the administration of justice. Id. at ___, 107 S.Ct. at 2138. Implicitly, the Court reached its conclusion without granting the Government an opportunity to demonstrate that it was harmless error for the court to make the challenged

appointment.[6]

Most recently, in United States v. Mechanik, 475 U.S. 66 (1986), this Court examined the post-trial exercise of its supervisory power to sanction an isolated prosecutorial violation of Rule 6(d)[7] in the grand jury proceedings. The Court applied the balancing test earlier enunciated in Hasting and held that the petit jury's verdict of guilty rendered

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[6]In the majority opinion, this Court did not expressly address the harmless-error doctrine in relation to the facts of the case. However, the plurality of the Court found that a concern for the demonstration of actual prejudice was inappropriate since "what [was] at stake [was] the public perception of the integrity of our criminal justice system". Young v. United States ex rel. Vuitton Et Fils S.A., ___ U.S. at ___, 107 S. Ct. at 2140.

[7]Rule 6(d) of the Federal Rules of Criminal Procedure provides that only specified persons, including "the witness under examination", may be present while the grand jury is in session.

harmless any errors in the grand jury process. Significantly, the Court placed great emphasis on the societal costs of reversal and retrial, including the impact on jurors, witnesses, courts, the prosecution, and the defendants. However, the Court left unanswered the issue of whether it would exercise its supervisory power to sanction misconduct that had occurred in the grand jury proceedings and was brought to a court's attention before the commencement of trial. United States v. Mechanik, 475 U.S. at 72.

Neither Hasting nor Mechanik bar a court from the pre-trial exercise of its supervisory power and the dismissal of an indictment, without a showing of prejudice, when conduct by a prosecutor threatens to undermine confidence in the integrity of the grand jury proceeding.

As Circuit Judge Seymour noted in the instant case,

> such a requirement would render a court's supervisory power superfluous because misconduct that does affect the grand jury's independence is a constitutional violation remediable under the Fifth Amendment.

United States v. Kilpatrick, 821 F.2d 1456, 1479 (1987)(Seymour, J., dissenting). Additionally, such a requirement would render Rules 6(d) and(e) of the Federal Rules of Criminal Procedure "a dead letter", see United States v. Mechanik, 475 U.S. at 73 (O'Connor, J., concurring in judgment), and allow serious prosecutorial misconduct to go undisciplined. Merely denouncing the Government's misconduct and then allowing the results of that misconduct to stand would amount to "a ritualistic verbal spanking", and "a condonation of counsel's alleged offense,

coupled with verbal reprobation".[8] United States v. Antonelli Fireworks. Co., 155 F.2d 631, 661 (2d Cir. 1946)(Frank, J., dissenting).

When the Government engages in serious misconduct in a grand jury proceeding, "[a] concern for actual prejudice. . .misses the point, for what is at stake is the public perception of the integrity of our criminal justice system." Young v. United States ex rel. Vuitton Et Fils S.A., ___ U.S. at ___, 107 S.Ct. at 2140 (Brennan, J., plurality). Although an individual

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[8]In the instant case, the district court's disapproval of the Government's misconduct had virtually no effect on the Government attorneys, as noted by District Judge Kane in his opinion: "What is perhaps most alarming is that even in the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues conduct as 'silly' and 'frivolous'". United States v. Kilpatrick, 594 F.Supp. 1324, 1352-53 (1984).

defendant may benefit from the exercise of a court's supervisory power in such a case, the invocation of the power is not to vindicate that defendant's individual rights, but rather to preserve the integrity of the grand jury system and to deter future prosecutorial misconduct. United States v. Omni International Corp., 634 F.Supp. 1414, 1438 (D.Md. 1986). If an indictment is permitted in the face of serious prosecutorial misconduct in the grand jury process, the federal court "places its imprimatur upon such lawlessness and thereby taints its own integrity." United States v. Payner, 447 U.S. at 746 (Marshall, J., dissenting).

Certainly, a federal court must proceed "with some caution" in exercising its supervisory power to dismiss an indictment. United States v. Payner, 447

U.S. at 734-35. However, when the prosecutor's misconduct is "something other than an isolated incident unmotivated by sinister ends", or such misconduct has become pervasive and flagrant in the particular circuit, the dismissal of an indictment in the exercise of its supervisory authority is an appropriate sanction, "despite the absence of prejudice to the defendant". United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979). In such cases, "[p]rejudice to the integrity of the judicial system should be sufficient." United States v. Kilpatrick, 821 F.2d at 1479 (Seymour, J., dissenting). If a federal court's supervisory authority is to have any viability, the court must be authorized to dismiss an indictment, absent a showing of actual prejudice, in cases of serious prosecutorial

misconduct.[9] In determining whether challenged prosecutorial conduct warrants dismissal of an indictment, this Court should employ the test enunciated by the Third Circuit in United States v. Serubo, 604 F.2d at 817:

> [D]ismissal of the indictment may be proper even where no actual prejudice has been shown, if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become "entrenched or flagrant" in the circuit.

The invocation of a court's supervisory power in cases meeting the Third Circuit test would promote the public's confidence in the integrity of the grand

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[9]This is particularly so in the context of grand jury proceedings. The grand jury is an ex parte proceeding, where opposing counsel is not present to interpose contemporaneous objections to governmental misconduct. Accordingly, unless these objections can be raised and sanctioned post-indictment and pre-trial, the misconduct will go undisciplined.

jury system and deter future misconduct by Government attorneys. The supervisory power must be exercised in such cases for a court cannot stand idly by, thereby becoming "the accomplice of the Government lawbreaker." United States v. Payner, 447 U.S. at 748 (Marshall, J., dissenting).

CONCLUSION

In the case at bar, the record is replete with evidence of serious and repeated misconduct by the Government attorneys. Unlike Mechanik, the challenged conduct consists of more than an isolated, technical violation of the Federal Rules of Criminal Procedure and was brought to the court's attention prior to trial. Accordingly, Amicus Curiae, the National Association of Criminal Defense Lawyers, for the reasons

stated herein, respectfully requests that this Court reverse the Court of Appeals for the Tenth Circuit, and hold that the District Court properly exercised its supervisory power in dismissing the indictment.

Respectfully submitted,

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